

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

MARK LARUE,

Petitioner,

vs.

WASHINGTON STATE DEPARTMENT
OF CORRECTIONS,

Respondent.

NO. CV-08-5069-JPH

ORDER ADOPTING REPORT AND
RECOMMENDATION AND DIRECTING
TRANSFER TO NINTH CIRCUIT COURT OF
APPEALS

BEFORE THE COURT are Petitioner's Objections to the Report and Recommendation to transfer this action to the Ninth Circuit Court of Appeals as a second or successive petition under 28 U.S.C. § 2244. Petitioner is currently serving a sentence for assault in the first degree, Walla Walla County cause number 73127. This sentence was consecutive to other sentences and Petitioner began serving it in 1997.

In Mr. LaRue's prior federal petition, cause number CV-07-243-EFS, filed July 20, 2007, he challenged the decisions of the Washington State Department of Corrections and the Indeterminate Sentence Review Board to deny him "earned time" under the first degree assault sentence. Petitioner contends his current petition should not

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1 be construed as a successive petition because "the parties, statutes
2 and credits under review . . . are entirely different"

3 The court is not persuaded by this contention. Mr. LaRue named
4 the Department of Corrections in his prior habeas action, as well as
5 in this action. He is challenging the length of the same first degree
6 assault sentence under Walla Walla County cause number 73127. Both
7 actions involve his ability to reduce that sentence, either through
8 the application of earned time credits or good conduct credits.

9 Attached to Mr. LaRue's petition is the "Washington Department of
10 Corrections Earned Early Release Credits" dated May 26, 2007 (Ct. Rec.
11 1, Exhibit A). According to this document, Petitioner had the
12 potential to earn 1440 days of good conduct time on his sentence from
13 Walla Walla County, cause number 73127, yet he had already lost 2386
14 days of good conduct time. Petitioner asserts he has not "lost" any
15 good conduct time since 1997. While this may be true, the deficit of
16 already lost good conduct time clearly exceeded the potential 1440
17 days Petitioner could have earned while serving this sentence. He
18 does not assert he has lost good conduct time that he is recorded as
19 having already accumulated. He does not identify any earned early
20 release days for good conduct he has been recommended to receive. The
21 court cannot restore that which was never available to Petitioner.

22 For the reasons set forth above and by the Magistrate Judge, **IT**
23 **IS ORDERED** the Report and Recommendation (Ct. Rec. 3) is **ADOPTED in**
24 **its entirety**. Accordingly, **IT IS ORDERED** this case is **TRANSFERRED** to
25 the Ninth Circuit Court of Appeals, pursuant to 28 U.S.C. § 1631 and
26 Ninth Circuit Rule 22-3(a).

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1 Petitioner is advised this transfer does not of itself constitute
2 compliance with § 2244(b)(3) and Ninth Circuit Rule 22-3; he must
3 still file an application for leave to proceed in the Court of Appeals
4 and make the showing required by § 2244(b)(2). Petitioner is directed
5 to consult this statute and Ninth Circuit Rule 22-3 for further
6 information.

7 **IT IS SO ORDERED.** The District Court Executive is directed to
8 transfer all original documents to the Ninth Circuit Court of Appeals.
9 The District Court Executive shall, however, retain a copy of the
10 petition and of this Order in the file. The District Court Executive
11 is further directed to enter this Order, forward a copy to Petitioner,
12 and close the file.

13 **DATED** this 15th day of December, 2008.

14
15 ***s/Lonny R. Suko***

16 _____
 LONNY R. SUKO
 UNITED STATES DISTRICT JUDGE